Supreme Court, U.S.
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No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JOHN DAVIS, on behalf of himself and all others similarly situated,
Petitioners,
v.
STATE OF ALABAMA, PERRY O. HOOPER, SR., LARRY ROE, JAMES D. MARTIN, AND ALL ALABAMA PROBATE JUDGES, SHERIFFS, AND COUNTY CLERKS IN THEIR OFFICIAL CAPACITIES, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the *Rooker-Feldman* doctrine (forbidding lower federal courts from reviewing state court orders under the guise of deciding constitutional issues) apply only when parties to the federal and state court litigation are identical—or does it (like closely analogous *Younger* abstention doctrine, *see Hicks v. Miranda*, 422 U.S. 332, 348-49, 95 S.Ct. 2281, 2291-92 (1975)) apply as well when the parties are closely related and represented by the same counsel?

2. Do principles of our federalism permit a federal court to intervene in a state election, before state election procedures have run their course, to prohibit the counting of absentee ballots which comply with state law, while there is state court litigation addressing the same issue?

3. Can, and should, federal courts forbid the counting of a class of ballots in a state election, based on a claimed constitutional right, when no one knows whether those ballots would affect the outcome of the election?

4. Does the Due Process clause of the Fourteenth Amendment grant some voters a right to disenfranchise others whose ballots are due to be counted in a state election under state law as construed by the state's highest court?

5. Does the Due Process clause of the Fourteenth Amendment forbid application of a state court interpretation of state election laws to the current state election, where that decision upholds rather than restricts the right to vote?

LIST OF PARTIES

John Davis, on behalf of himself and all others similarly situated, is the Petitioner and is a defendant below. The defendant class on behalf of whom he was sued was described by the plaintiffs as the "class of persons who sought to have their ballots counted in an action in the Circuit Court of Montgomery County [Alabama] under the style *Odom v. Bennett*, No. CV 94-2434."

Larry Roe, Perry O. Hooper, Sr., and James D. Martin are Respondents and are plaintiffs below.

The remaining Respondents, defendants below, are the State of Alabama; James Bennett in his official capacity as Secretary of State of the State of Alabama; Mobile County Appointing Board; Wilcox County Appointing Board; Lionel W. Noonan in his official capacity as Probate Judge of Mobile County, Alabama; Jerry Boggan in his official capacity as Probate Judge of Wilcox County, Alabama; all Probate Judges in the State of Alabama in their official capacities (who are, according to the Amended Complaint, Cordy Taylor, Harry D'Olive, W. Mack Price, Glenn Lightsey, Frank J. Green, Rufus Charles Huffman, Sr., Calvin Steindorff, Arthur C. Murray, Emerson Thompson, Philip Jordan, Robert M. Martin, Charles V. Ford, Clarence Watters, Douglas Hamlin, Mac Smith, Marion Brunson, W. Thomas Crosslin, Rogene Booker, Jasper Fielding, Sherrie R. Phillips, Dwight Faulk, Tom Burleson, Curt Head, John W. Jones, Jr., Paul Thomas, Edward W. Enslen, Devon Wiggins, Bobby Junkins, William Oswalt, Larry N. Jackson, Harold B. Wise, Earlean Isaac, E. Riley Lucas, Jackey T. Harpe, Cletus N. Youmans, Robert I. Gentry, George R. Reynolds, Ted Boyett, William L. Hanbery, Richard I. Proctor, Hal Smith, Michael L. Davis, O.P. Woodruff, Alphonso Menefee, Frank H. Riddick, Jr., Cindy Hopkins, Annette Bozeman, Tim Mitchell, Lionel W. Noonan, Otha Lee Biggs, Walker Hobbie, Jr., Bobby G. Day, Donald Cook, Roy Kelly, John W. Gibson, Mack Diamond, Lee Lott, Thomas A.

Snowden, Jr., Wallace Wyatt, Jr., Sam Massingill, Donald Fox, W. Hardy McCollum, Stanley Wade, Tom W. Turner, Jerry Bogan, and Billy C. Ford); all Sheriffs in the State of Alabama in their official capacities (who are, according to the Amended Complaint, James W. Johnson, Jimmy Johnson, Robert Smith, Bob Rinehart, Larry Staton, H.O. Williams, Joe C. Sanders, Roy C. Snead, Jr., James C. Morgan, Roy Wynn, Neely Strength, Donald F. Lolley, Ray Sheffield, Ralph Toland, Darrell Durham, Brice R. Paul, John L. Aldridge, Edwin Booker, William A. Evans, Wilbur Mitchell, Robert Colquett, David C. Laney, Bryant Mixon, Bill Franklin, Timothy A. Hawsey, James Hayes, James Turner, Larry Plott, Douglas Whittle, George Hall, Larry G. Johnson, Lawton Ed Armstrong, Lamar Hadden, Mike Wells, Melvin Bailey, Terry Perkins, Billy Townsend, Grady Rose, Herman Chapman, Mike Blakely, Willie Vaughner, Elbert Dawson, Joe W. Patterson, Roger Davis, J. Max Brashier, Edsel Whitten, Thomas J. Purvis, Thomas Tate, Dan Jones, Steve Crabbe, James Hood, David Abston, Harold Anderson, Larry Colley, Thomas F. Boswell, James Jones, Lewis Brown, Melvin Stephens, Jerry Studdard, Joe Smith, Joe B. Robertson, William J. Wheat, Prince Arnold, and Hobby Walker); and all Circuit Clerks in the State of Alabama in their official capacities (who are, according to the Amended Complaint, Fred Posey, Jackie Calhoun, David S. Nix, R.L. Foster, Michael E. Criswell, Curtis J. Elzie, Bobby T. Branum, Barbara Craft, Phyllis Cumbee, Carolyn M. Smith, Mike Smith, Wayne Brunson, Robert Giddens, Horace D. Perry, Jim Ellis, C. Phillip Bowling, Jean E. Riley, Roger A. Powell, Ann W. Tate, Robert G. Bates, Bettye B. Garrett, W.A. Kynard, Jimmy Lindsey, Earl Sayers, James D. Taylor, Bill S. Yates, James E. Renfroe, J.T. Newton, Veleria Thomley, Johnnie Knott, Connie Burdenshaw, Julia L. Trant, Leonard V. Griggs, Polly Conradi, Carl F. Woods, Kenneth C. Austin, W. Larry Smith, Annette H. Hardy, Charles Page, Jr., Elsie Davis, Eddie D. Mallard, Billy

D. Harbin, Dewaine Sealy, James O. Garrard, Jean Albert Scott, Susan F. Wilson, John Sawyer, Debra P. Hackett, Cleo D. Teague, Mary C. Moore, Jack T. Pate, Brenda M. Peacock, Kim S. Benefield, Devon Kiker, Dan Reeves, Jean Browning, Carole Smith, Samuel L. Grice, Frank Lucas, Doris T. Turner, Vinita B. Thompson, Jackie B. Howard, Willie Powell, and W.F. Bailey).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. Introduction	3
B. Statement of Facts and Course of Proceedings in the Lower Courts	5
REASONS FOR GRANTING THE WRIT	11
CONCLUSION	22

TABLE OF AUTHORITIES

CASES: Page

Campbell v. Jefferson County, 216 Ala. 251, 113 So. 230 (1927) 6
Collins v. City of Harker Heights, Tex., —— U.S. —— (1992) 18
Curry v. Baker, 802 F.2d 1302 (11th Cir. 1986) 3, 13
District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) 4, 14-15
Garrett v. Cunninghame, 211 Ala. 430, 100 So. 845 (1924) 6
Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978) 21
Hicks v. Miranda, 422 U.S. 432 (1975) 15
Hubbard v. Ammerman, 465 F.2d 1169 (5th Cir. 1972) 3, 14
Hutchinson v. Miller, 797 F.2d 1279 (4th Cir. 1986) 3, 14
Oregon v. Mitchell, 400 U.S. 112 (1970) 13
Partido Nuevo Progresista v. Barreto Perez, 639 F.2d 825 (1st Cir. 1980) 3, 14, 17, 21
Pettengill v. Putnam County R-1 School Dist., 472 F.2d 121 (8th Cir. 1973) 3, 14, 17
Powell v. Power, 436 F.2d 84 (2d Cir. 1970) 3, 14
Reynoldsville Casket Co. v. Hyde, —— U.S. —— (1995) 19
Rivers v. Roadway Express, Inc., —— U.S. —— (1994) 19
Roe v. Alabama, 52 F.3d 300 (11th Cir. 1995) ..... *passim*
Roe v. Alabama, 43 F.3d 574 (11th Cir. 1995) ..... *passim*
Roe v. Mobile County, —— So.2d —— (Ala. 1995) ..... *passim*
Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) .. 4, 14-15
U.S. v. Lopez, —— U.S. —— (1995) 12
U.S. Term Limits v. Bryant, —— U.S. —— (1995) 12, 18
Wells v. Ellis, 551 So.2d 382 (Ala. 1989) 6
Williams v. Lide, 628 So.2d 531 (Ala. 1993) 6

CONSTITUTION, STATUTES AND RULES:

U.S. Constitution
Art. I, § 4 ..... 2, 13
Art. IV, § 1 20

TABLE OF AUTHORITIES—Continued

	Page
Tenth Amendment	3, 13
Fourteenth Amendment	*passim*
Fifteenth Amendment	14
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1738	20
42 U.S.C. § 1983	7
42 U.S.C. § 1973ee-3(b)	2
Voting Rights Act of 1965	6, 14
Ala. R. App. P. 16(b)	20
Ala. Code § 12-2-14 (1975)	21

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PETITION FOR WRIT OF CERTIORARI

Petitioners John W. Davis and the class he represents respectfully pray that a writ of certiorari issue to review the April 26, 1995, order and mandate of the United States Court of Appeals for the Eleventh Circuit, *Roe v. Alabama*, 52 F.3d 300 (11th Cir. 1995).

OPINIONS BELOW

The April 26, 1995, decision of the United States Court of Appeals for the Eleventh Circuit, to be reported at 52 F.3d 300 (11th Cir. 1995) ("*Roe III*"), is

reproduced in Appendix A (1a-13a). The initial January 5, 1995, opinion of a panel of the Eleventh Circuit is reported at 43 F.3d 574 (11th Cir. 1995) ("*Roe I*"), and is reproduced in Appendix B (14a-40a). In that decision, the panel certified an issue to the Supreme Court of Alabama. The March 14, 1995, decision of the Alabama Supreme Court, to be reported at —— So.2d —— (Ala. 1995) ("*Roe II*"), is reproduced in Appendix C (41a-162a). The preliminary injunction entered on December 5, 1994, by the U.S. District Court for the Southern District of Alabama is not officially reported but is reproduced in Appendix D (163a-168a).

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on April 26, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, § 4 of the United States Constitution provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof, but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." There is no provision in the Constitution which specifically governs state elections, and Congress has passed no law requiring that an absentee ballot be notarized or that it have two witnesses.[1]

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[1] In fact, Congress has prohibited states from imposing a strict notarization requirement for absentee voting. *See* Voting Accessibility for the Elderly and Handicapped Act, 42 U.S.C. § 1973ee-3(b).

The Tenth Amendment to the Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Fourteenth Amendment provides, in pertinent part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. Introduction

This case involves fundamental issues of federalism, federal court jurisdiction, and Constitutional law. The issues grow out of the November 1994 general election for state offices in the State of Alabama. The dispute between the parties has its roots in whether the State of Alabama can count, and can include in certified election results, a certain group of absentee ballots which comply in every respect with state law, as construed by its highest court. This petition is submitted on behalf of approximately 1700 to 2000 absentee voters (the Davis class) who seek to have their votes counted as state law indisputably requires and as the state courts have ordered.

The U.S. District Court for the Southern District of Alabama, and the U.S. Court of Appeals for the Eleventh Circuit, have injected themselves into this ballot-counting dispute in this election for state elective offices, even though the entire weight of federal jurisprudence teaches that state control over state elections is fundamental to our system of federalism.[2] They have issued, and affirmed, a preliminary injunction against the opening and counting of the votes of the Davis class. They have

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[2] *See, e.g., Curry v. Baker*, 802 F.2d 1302 (11th Cir. 1986); *Hubbard v. Ammerman*, 465 F.2d 1169 (5th Cir. 1972); *Pettengill v. Putnam County R-1 School Dist.*, 472 F.2d 121 (8th Cir. 1973); *Powell v. Power*, 436 F.2d 84 (2d Cir. 1970); *Partido Nuevo Progresista v. Barreto Perez*, 639 F.2d 825 (1st Cir. 1980); *Hutchinson v. Miller*, 797 F.2d 1279, 1283 (4th Cir. 1986).

done so in a case which is merely a direct attack on an order of a state court in ongoing litigation, in violation of the *Rooker-Feldman*[3] doctrine and every principle of abstention and other doctrines of federalism. They have done so on the unprecedented and unsupportable theory that some persons can have a due process right under the Fourteenth Amendment to disenfranchise the Davis class, even though the Davis class's votes are due to be counted under state law as construed by the State's highest court. They have done so, even though no one knows whether the Davis class's votes will even affect the outcome of the election; and no one will ever know that, until after all of the Davis class's votes are counted and after state election contest proceedings have concluded.

If allowed to stand, the decision below will invite and indeed mandate federal judicial intervention in a wide array of state election disputes, in which heretofore the federal courts have wisely and appropriately stayed out of the fray. Because this case is so important to our system of federalism, and to the public perception of the federal courts as an apolitical institution, it is critical that this Court put a halt to this exercise by granting the writ of certiorari to the Court of Appeals for the Eleventh Circuit, rather than waiting for further proceedings in the District Court to run their course, past the preliminary injunction stage.[4] The process of ongoing

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[3] *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303 (1983).

[4] The parties have just begun a time-consuming, burdensome and expensive discovery process, to answer the 17 questions in the final order of the Eleventh Circuit. That order requires discovery and ultimately evidence on the voting practices in each of the 67 counties in Alabama. Trial is set for September 19, 1995. If this Court does not act now to grant certiorari and stay proceedings in the Courts below, the parties will expend enormous resources in the federal court proceedings.

federal court intervention itself—and not merely the ultimate outcome after proceedings on remand, whatever it may be—is an integral part of the wrong here.

B. Statement of Facts and Course of Proceedings in the Lower Courts

This case involves the November 8, 1994, general election in Alabama, most particularly with regard to the race for Chief Justice of the Alabama Supreme Court.[5] That race is very close, with only 262 votes separating the two principal candidates if one excludes the Davis class's absentee ballots, according to the most recent figures from Alabama's Secretary of State. Because of this litigation, there are no official returns and no victor has been certified in that race.

This litigation, and the other litigation discussed herein, concern whether certain absentee ballots should be counted. Those are the ballots of the Petitioner Davis class. According to unofficial returns, the results of the Chief Justice race *could* be affected by those ballots, if they are counted—but at this point no one knows, because the District Court and the Court of Appeals for the Eleventh Circuit have forbidden anyone from finding out.[6]

The procedural history of this case begins in state court. A Montgomery, Alabama, state trial court judge, the Honorable Eugene Reese, issued a preliminary injunction shortly after the general election requiring the

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[5] While this litigation also involves the office of State Treasurer, there is really no dispute but that Ms. Baxley, the Democratic candidate, is the victor, with or without the votes in question. For this reason, the Republican Governor appointed her to office when the previous Treasurer resigned.

[6] While the Eleventh Circuit's April 26, 1995, opinion might be interpreted to allow the counting of the Davis class ballots in order to see whether they affect the outcome of the Chief Justice race, the District Court on remand has rejected that interpretation.

Secretary of State to include, in the official vote counts, absentee ballots which were signed by the voter but were not also notarized or witnessed by two persons. That injunction was issued in litigation brought by John Davis (Petitioner herein, on behalf of the class of similarly situated voters) and another voter. The injunction was based on the holding that such absentee ballots complied with the requirements of Alabama law, and that Alabama law required that such ballots be counted. The injunction followed decades of Alabama case law holding that "substantial compliance" with voting statutes is sufficient to require that ballots be counted.[7] The Alabama Republican Party was a party to that litigation at the time the injunction was issued, and at all times since. The Republican Party could have appealed Judge Reese's injunction to the Alabama Supreme Court, but chose not to. Counsel for the Republican Party admitted in open court that the decision not to appeal that injunction to the Alabama Supreme Court was made for "strategic" reasons. *See* Ala. S.Ct. Slip Opinion, *Roe II*, at 6 (Appendix at 45a).

Shortly after Judge Reese issued that injunction, the plaintiffs in this case—the Republican candidates for Treasurer and Chief Justice, and a member of the Executive Board of the State Republican Party—sought an order from the U.S. District Court for the Southern District of Alabama that the Davis class's votes not be counted, on the theory that Judge Reese's order was unconstitutional. Those plaintiffs are represented by, among others, the same attorney who represented the Republican Party in the state court litigation.[8] The Davis

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[7] *See, e.g., Garrett v. Cunninghame*, 211 Ala. 430, 438, 100 So. 845, 853 (1924); *Campbell v. Jefferson County*, 216 Ala. 251, 113 So. 230 (1927); *Wells v. Ellis*, 551 So.2d 382 (Ala. 1989); *Williams v. Lide*, 628 So.2d 531, 536 (Ala. 1993).

[8] Those same attorneys had previously attacked Judge Reese's order in a Voting Rights Act suit brought in the U.S. District

class was made a defendant in this federal litigation. Within five working days after the Republican plaintiffs sought such relief in federal district court, the, district court held a preliminary injunction hearing and issued a preliminary injunction requiring the Secretary of State to certify the results of the Chief Justice race (and the Treasurer's race) *without* the Davis class's ballots, even though such relief had not been requested in the pleadings. This injunction was based on the district court's preliminary understanding that such unnotarized and unwitnessed ballots had not been counted in the past, and on the district court's "finding" that Judge Reese was wrong as a matter of state law. The injunction was further based on the legal assertion that the plaintiffs had a right under the Due Process clause of the Fourteenth Amendment, asserted through 42 U.S.C. § 1983, to disenfranchise the Davis class. *There was not, and still is not, any shred of evidence that many such ballot is fraudulent in any way, or that any such ballot was cast by anyone other than a qualified voter. Despite the resort to hyperbole by the respondents, there is no evidence of "ballot box stuffing".*

The Davis class, and the State of Alabama and government official defendants, appealed the preliminary injunction to the U.S. Court of Appeals for the Eleventh Circuit. A divided panel of that Court issued an interim decision, *Roe v. State of Alabama*, 43 F.3d 574 (11th Cir. 1995). The panel majority indicated that the counting of the Davis class's ballots would violate the Fourteenth Amendment Due Process clause, because (it asserted) such votes had not been counted in past Alabama elections. The panel majority then certified to the Alabama Supreme Court the question whether such bal-

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Court for the Northern District of Alabama, in Birmingham. When the Northern District refused to enjoin the enforcement of Judge Reese's order, the attorneys moved their focus to this suit, in the Southern District in Mobile.

lots were due to be counted under Alabama law. In the interim, the panel ordered that the Davis class ballots not be counted, and that no results be certified in the Chief Justice or Treasurer races. The panel majority rejected the defendants' arguments, including (i) that there is no federal right in some voters to disenfranchise others who are undisputably qualified voters; (ii) that the federal suit was barred by the *Rooker-Feldman* doctrine and *Pullman* abstention; (iii) that no federal intervention was appropriate before the Davis class ballots were counted (that is, before anyone knows whether those ballots would even affect the outcome of any race); and (iv) that the panel majority was simply wrong about prior election practice in Alabama, and that unnotarized and unwitnessed ballots had been counted in the past—and indeed were counted in the 1994 election—in many Alabama counties (and thus that there was no basis for a Due Process bar to their being counted in this election). With regard to the last point, the panel majority even went so far as to indicate that the preliminary injunction could be treated as a final one—even though it was issued only days after the plaintiffs first raised their claims, and even though there was no notice that the preliminary injunction hearing would be considered a final hearing on the merits.

Circuit Judge Edmondson dissented from the panel majority decision, recognizing its detrimental impact on our system of federalism. He wrote, in part:

> I know of no other case involving disputed ballots in which a federal court has intervened in a state election where the plaintiff failed to show, in fact, either:
>
> 1. that plaintiff had "lost" the election but would have won the election if lawful votes only had been counted (that is, the alleged constitutional error changed the election results); or
>
> 2. that it was impossible ever to know that his opponent (the apparent winner) had truly

> won the election because of the nature of the voting irregularities (that is, the alleged constitutional error placed in everlasting doubt what was the true result of the election).

Nothing is known in this case about whether the alleged illegalities have affected or will affect the outcome of the pertinent elections. Yet today we plow into Alabama's election process and uphold a preliminary injunction that, in effect, overrules a preexisting state court order which had directed that the contested votes be counted. And, instead, the federal courts (basically, stopping short the state election process) order that the contested votes be *not* counted at all. This high level of federal activity seems unnecessary and, therefore, improper. So, I conclude that the district court abused its discretion.

. . .

This difference with my colleagues is more than just academic bickering about technicalities. Federal courts are not the bosses in state election disputes unless extraordinary circumstances affecting the integrity of the state's election process are clearly present in a high degree. This well settled principle—that federal courts interfere in state elections as a last resort—is basic to federalism, and we should take it to heart.

. . .

Some of the ideas expressed in today's court opinion are, to me, doubtful: such as the theory that Alabama's legislature has the power in election contests to act contrary to the law of Alabama as declared by Alabama's highest court; the conclusion that an election contest before the legislative commission is inadequate to determine the legal issues raised by plaintiffs; the thought that only absolute identity of parties in the state court action and federal court action (without regard to state-case parties possibly under the control of or in privity with federal-case parties)

> will trigger a *Rooker-Feldman* bar in federal court; and the perception that a federal court order that countermands a pre-existing Alabama court order maintains the status quo in Alabama.

Roe II, 43 F.3d at 585-86 (Edmondson, J., dissenting).

On March 14, 1995, the Alabama Supreme Court issued its decision on the question certified to it by the panel majority. In that opinion, *Roe v. Mobile County Appointing Bd.*, —— So.2d —— (Ala. 1995), the Alabama Supreme Court squarely held that the Davis class's ballots were due to be counted, and required to be counted, under Alabama law. The Court emphasized that *if* there were ever any evidence that any such ballot was fraudulent, then Alabama law permitted and required that such evidence be addressed in an election contest (which, for the Chief Justice position, would be in the Alabama legislature).

Equally importantly, the Alabama Supreme Court transmitted to the Eleventh Circuit a copy of the record in the state court litigation, which had become more fully developed since the hastily-convened federal court injunction hearing and since the issuance of the Eleventh Circuit's interim decision. As that record shows, and as the Alabama Supreme Court recognized, it is undisputed in the evidence that ballots just like those of the disenfranchised Davis class—that is, not notarized or witnessed—have been counted in many Alabama counties in previous elections, *and were counted in some Alabama counties in the 1994 election.*

The Alabama Supreme Court also stated its strong belief that the federal courts' intervention into this matter—when state court litigation was ongoing—was an affront to the basic values of federalism and comity between state and federal courts. On every critical point in the panel majority's interim opinion, the Alabama Supreme Court issued a well-detailed and exhaustive show-

ing of how the panel majorty's action conflicted with long-standing law.

After receipt of the Alabama Supreme Court's decision, the panel of the Eleventh Circuit issued another decision, *Roe v. State of Alabama*, 52 F.3d 300 (11th Cir. 1995). Without explanation or discussion of any legal issue involved, the panel "remand[ed] these proceedings to the district court for a trial on the merits." *Id.* at 301. The Eleventh Circuit set forth an extensive but not exclusive list of factual inquiries to be addressed through discovery and trial.

The Davis class brings this Petition at this time in order to avoid further months of disruption and delay to the State's electoral system. Rather than putting the parties and the lower courts to the inordinate time and expense of lengthy pre-trial and trial proceedings, the Davis class seeks to establish that this case should be dismissed now as a matter of law. Only in that way can the ongoing affront to core values of federalism be alleviated.

REASONS FOR GRANTING THE WRIT

The State of Alabama has decided that absentee ballots in its state elections are to be counted even if they are not notarized nor witnessed by two witnesses. That was the interpretation of state law which state trial judge Reese reached, and that was likewise the interpretation of state law which the Alabama Supreme Court reached. Those state courts—the trial court and the high court—therefore ruled that if some state and local officials had been acting under a contrary (which is to say, erroneous) understanding, they should conform their behavior to the law and count the ballots of the Davis class.

In the most basic sense, the question in this case is whether the lower federal courts can and should overrule state trial court Judge Reese and the Alabama Supreme Court in this regard, and disenfranchise the Davis class.

More particularly, this case presents two sets of issues. The first set, issues 1 through 3, have mostly to do with the relations between state and federal courts and with federal court jurisdiction. The second set, issues 4 and 5, have mostly to do with substantive constitutional law under the Fourteenth Amendment; these issues, like the first set, raise important issues of federalism.

All of these issues are of fundamental importance, and on all of them the decision below conflicts with decisions of this Court and other courts. The writ of certiorari should issue for the following reasons.

1. It is, first, important to reiterate the theme that recurs through all of the issues in this case: the theme of American federalism. No issue is more important to the health of our nation than a proper balance between states and the federal government. This Court has recently and increasingly been called upon to maintain that proper balance, most notably this Term in *U.S. v. Lopez*, —— U.S. ——, 115 S.Ct. —— (April 26, 1995) and *U.S. Term Limits v. Bryant*, —— U.S. ——, 115 S.Ct. —— (May 22, 1995). In *Lopez* and *Bryant*, as in other decisions throughout this nation's history, this Court has delineated the proper spheres of state and federal authority, recognizing that the presuppositions of our political history, and our written Constitution, place some issues squarely within the control of the states and others within federal control.

This case involves the area of law which, more than any other, is both historically and constitutionally reserved to the states: the control of elections for state elective offices, and in particular the decision as to the mechanics of such elections. This is the most fundamental aspect of sovereignty: the power to determine how the government is structured and chosen. Even with regard to elections for federal office, the Constitution explicitly reserves to the states in the first instance the power to control the mechanics of such elections. *See*

Article I, Section 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . ."). The mechanics of elections for *state* officials (such as Chief Justice of the State Supreme Court), even more so than for Congress, are clearly within the scope of the Tenth Amendment's declaration that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." As Justice Black wrote, the Constitution was

> intended to preserve to the States the power that even the Colonies had to establish and maintain their own separate and independent governments, excepts insofar as the Constitution itself demands otherwise. . . . [T]he Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections. . . No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own votes for state, county and municipal offices and the nature of their own machinery for filling local public offices. . . . It is obvious that the whole Constitution reserves to the States the power to set voter qualifications in state and local elections, except to the limited extent that the people through constitutional amendments have specifically narrowed the powers of the States.

Oregon v. Mitchell, 400 U.S. 112, 124-25, 91 S.Ct. 260, 265 (1970).

Thus prior federal decisions are in accord that federal court intervention in state elections—and particularly with regard to the mechanics of the elections, such as the marking and casting of ballots—should come only with great hesitation, in the most extreme cases, and upon clearest constitutional or statutory authority. *See, e.g., Curry v. Baker*, 802 F.2d 1302 (11th Cir. 1986);

Hubbard v. Ammerman, 465 F.2d 1169 (5th Cir. 1972); *Pettengill v. Putnam County R-1 School Dist.*, 472 F.2d 121 (8th Cir. 1973); *Powell v. Power*, 436 F.2d 84 (2d Cir. 1970); *Partido Nuevo Progresista v. Barreto Perez*, 639 F.2d 825 (1st Cir. 1980); *Hutchinson v. Miller*, 797 F.2d 1279, 1283 (4th Cir. 1986).[9]

Against this background of the federal courts' uniform reluctance to interject themselves into disputes over the mechanics of state elections, the decision below is extraordinary and worthy of this Court's review. It represents either an ad hoc and inexplicable violation of long-standing principles of federalism, or a harbinger of a new tradition of federal judicial activism in state election disputes. In either event, it is worthy of this Court's consideration and full review.

2. As to issues 1 through 3, the decision of the U.S. Court of Appeals for the Eleventh Circuit conflicts with the decision of the Supreme Court of Alabama, and with decisions of other courts including this Court, on important questions of federal law which should be decided by this Court.

The first issue concerns the scope of the *Rooker-Feldman* doctrine, which reserves to this Court alone among the federal courts the jurisdiction and power to review state court decisions. Even though this case is simply and clearly an attack on Judge Reese's order that

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[9] Since the adoption of the Fourteenth and Fifteenth Amendment there is certainly some room for federal authority over state elections, and even over the mechanics of electoral processes, where there is a claim or evidence of discrimination. Likewise, the Congress has the authority to enact legislation pursuant to those Amendments, such as the Voting Rights Act of 1965, which impacts upon the mechanics of state elections. The decision below, however, does not purport to be based on the Voting Rights Act of 1965 or any other similar legislation. It does not even purport to be based on the Equal Protection clause of the Fourteenth Amendment, or on the Fifteenth Amendment; there is no hint that Judge Reese's order or the Alabama Supreme Court's decision are racially discriminatory.

the Davis class's ballots be counted, and even though Republican counsel before Judge Reese is also Republican counsel in the federal litigation, the panel majority concluded that the *Rooker-Feldman* bar did not apply because the Republican *Party* was the party before Judge Reese and (by slight contrast) the Republican *candidates* and a Republican Party *officer* are the parties to the federal attack. *Roe I*, 43 F.3d at 580, Appendix at 24a. The dubiousness of this conclusion, and its deservingness of this Court's review, are shown by (a) Judge Edmondson's expressed doubts as to its correctness (43 F.3d at 586, Appendix at 40a); (b) the precisely contrary decision by the Alabama Supreme Court (*Roe II*, Appendix at 64a); and (c) the fact that this Court has rejected such a formal distinction in the closely analogous *Younger* abstention context, *see Hicks v. Miranda*, 422 U.S. 332, 348-49, 95 S.Ct. 2281, 2291-92 (1975).

The second issue raises related concerns, invoking not only *Rooker-Feldman* doctrine but also other related abstention doctrines. This second issue, as well as the third, also emphasize that federal court intervention is at the very least premature—and is, more to the point, beyond the federal courts' Article III jurisdiction over cases and controversies. This is so, because no one yet knows even whether the Davis class's ballots will affect the outcome of the Chief Justice's race; and because state law provides for post-election procedures such as an election contest (which, as to the Chief Justice race, would take place in the Alabama legislature) which could also dispositively affect the outcome of the Chief Justice race for reasons having nothing to do with the Davis class's ballots. On these issues as well, the Alabama Supreme Court after careful consideration reached conclusions completely opposite to those of the Eleventh Circuit [10], and this Court should review the case in order to resolve this conflict.

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[10] As the Alabama Supreme Court explained, Appendix at 67a-68a, "No one in Alabama or anywhere else knows who will win the

In short, this Court should act now to resolve this important conflict between the Supreme Court of Alabama and the Eleventh Circuit. These are issues of law which will not depend on further fact-finding below; they are ripe for decision now. Indeed, further proceedings below are *themselves* the harm to our system of federalism which this Court should avoid. For these reasons, the writ should be granted.

3. As to issues 4 and 5—which are, so to speak, the questions of substantive constitutional law "on the merits,"—the decision below likewise raises important issues and conflicts with many other decisions. In fact, the decision below is without precedent: the Eleventh Circuit has held that some voters have a constitutional *right*, under the Due Process clause of the Fourteenth Amendment, to disenfranchise other qualified voters whose ballots complied with state law as construed by the State Supreme Court. The Eleventh Circuit has held that if election officials had in the past been acting under a misapprehension of what state law required—and had therefore been erroneously excluding ballots which should have been counted—the Due Process clause forbids the state courts from correcting that mistake in the context of this election.

Even if one joined the plaintiffs' and the Eleventh Circuit's erroneous assumption that counting the Davis class's ballots would constitute a change from a uniform prior practice, *still* the decision would be without precedent and

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election for Chief Justice when the uncounted ballots are counted. The results of the election have not been determined. The winner has not been certified. The loser, when the result is determined, has a statutory . . . right to contest the election in the state legislature. As a practical matter, it is only after all of the votes have been counted, the election results have been certified, and either the time for an election contest has elapsed, or a contest has been concluded that conclusive effect is given to the ballots cast in an election. . . . Plaintiffs' contention that they will suffer a deprivation of their due process rights when these absentee ballots are counted is pure speculation."

would indeed conflict with the most closely analogous federal decision, *Partido Nuevo Progresista v. Barreto Perez*, 639 F.2d 825 (1st Cir. 1980), *cert. denied*, 451 U.S. 985 (1981). *Partido Nuevo Progresista* involved a decision by the Puerto Rico Supreme Court that a certain class of ballots, marked in a certain way, should be counted. In that case, as here, the plaintiffs contended that such ruling amounted to a change from prior practice; they contended, as do the plaintiffs here, that the Due Process clause of the Fourteenth Amendment forbade such a "change." The U.S. Court of Appeals for the First Circuit rejected their claim in no uncertain terms. Similarly, the Eighth Circuit was confronted with a claim that voters' due process rights were violated by alleged voting irregularities, including that "116 electors cast absentee ballots which were void since there were irregularities in the application, delivery, or execution of these ballots." *Pettengill v. Putnam County R-1 School Dist.*, 472 F.2d 121 (8th Cir. 1973). The Eighth Circuit resoundingly rejected the claim and held that there was no federal jurisdiction: "Appellants attempt to posit the existence of federal jurisdiction on the theory that the board of education . . . has diluted appellants' legal votes by counting illegally cast votes and that such (state) action amounts to a deprivation of appellants' civil rights. We reject this theory. Appellants cite no cases, and we have found none, which authorize a federal court to be the arbiter of disputes over whether particular persons were or were not entitled to vote or over alleged irregularities in the transmission and handling of absentee voter ballots." *Id.* at 122. The Eleventh Circuit panel decision in this case thus creates a stark split in the Circuits.

The other Circuits clearly have the better of this argument. As discussed above, the mechanics of state elections are squarely reserved for state control except where some specific constitutional (or perhaps clear statutory) command is violated. Here, however, the Eleventh Circuit's theory is not based on any concrete or specific con-

stitutional (or even statutory) basis but is instead simply an unprecedented theory built loosely on the Due Process clause, and presumably on so-called "substantive" due process (for it is hard to imagine what further procedure one could hope for than a decision of the Alabama Supreme Court after full briefing). It thus calls to mind—and, more to the point, violates—this Court's admonition about substantive due process:

> As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and openended. . . . The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.

Collins v. City of Harker Heights, Tex., —— U.S. ——, ——, 112 S. Ct. 1061, 1068 (1992). It is, of course, impossible to find in the text of the Due Process clause any "right" to disenfranchise other qualified voters. *Cf. U.S. Term Limits v. Bryant*, —— U.S. at ——, 115 S.Ct. at —— (Thomas, J., dissenting) ("[W]here the Constitution is silent, it raises no bar to action by the States or the people."). It is equally impossible to find such a "right" in the history or purpose of the clause. There is no sense in which it deprives the plaintiffs of "life, liberty or property"—and certainly not "without due process of law"—to count ballots which were cast by qualified voters and which comply fully with state law.

The Eleventh Circuit in this case sought to bolster its unprecedented Due Process theory, by suggesting that a "change" towards counting unnotarized and unwitnessed ballots would be unconstitutional because some voters and candidates might have relied on their prior understanding that such ballots would not be counted. This rationale should not dissuade this Court from granting review; instead, the rationale itself raises further important issues of jurisprudence which also counsel in favor of this Court's review. That is, the Eleventh Circuit's *sua sponte*

invocation of some supposed "reliance interest"—the notion that a state court is constitutionally prohibited from requiring state officials to abide by state law, simply because some citizens might have misunderstood state law themselves—conflicts with the principles which this Court has recently been establishing and reiterating regarding the nature of judicial decisions and the "retroactivity" thereof. The Eleventh Circuit's suggestion, that the rulings by Judge Reese and the Alabama Supreme Court amounted to a "change" in the law, conflicts with this Court's expressed understanding of the nature of a judicial interpretation of a statute: "A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express Inc.*, —— U.S. ——, ——, 114 S.Ct. 1510, 1519 (1994). And the Eleventh Circuit's suggestion, that even if the law of Alabama is now settled in favor of counting these ballots it cannot constitutionally be applied to *this* election, conflicts with this Court's recent and continuing emphasis that judicial decisions not only *can*, but *should*, be applied "retroactively" even if some claim to have relied on their own prior misunderstanding of the law. *E.g.*, *Reynoldsville Casket Co. v. Hyde*, —— U.S. ——, 115 S.Ct. ——, 63 U.S.L.W. 4408 (1995).

In short, the Eleventh Circuit's suggestion that the Due Process clause grants the plaintiffs a right to disenfranchise the Davis class is without precedent. It is in direct conflict with a decision from the First Circuit, and conflicts with jurisprudential principles which this Court has continually reemphasized in recent cases. This Court should grant review, lest the Eleventh Circuit's decision mark the beginning of a new era of federal judicial intervention in a wide range of state election disputes.

4. Having litigated this case for some months now, we anticipate most if not all of what the Respondents will say in opposition to this Petition. Here, we will try to set the record straight in advance.

First, this case is not in any sense about "stuffing the ballot box," as the Respondents are fond of charging. There is, again, *no evidence of any fraud whatsoever with regard to any ballot, and no evidence that any absentee ballot was cast by anyone other than a qualified voter*; obviously, if there ever *is* such evidence, it can be raised (as the Alabama Supreme Court held) through a state-law election contest. This case is merely about whether a certain class of ballots, cast by qualified voters on election day, will be counted as state law requires.

Second, the Respondents may suggest to this Court that state trial court Judge Reese, and the Alabama Supreme Court, were engaged in some politically-motivated kind of decisionmaking rather than deciding questions of state law to the best of their honest abilities. We trust that the Justices of this Court will treat such disrespectful attacks with the scorn they deserve. The plaintiffs, who have repeatedly made such attacks, should be reminded of the "full faith and credit" provisions of Article IV Section 1 and of 28 U.S.C. § 1738, as well as central principles of comity. Certainly this Court does not sit to indulge political attacks on state supreme courts.

Third, the decision of the Alabama Supreme Court in response to the question certified to it by the Alabama Supreme Court was, in fact, a decision of the Alabama Supreme Court (and not, as some Respondents are fond of implying, merely a decision by four of the nine justices). Of the nine justices, Chief Justice Hornsby and Justice Houston recused themselves, leaving seven justices competent to hear the case. Five did so, of whom four joined the per curiam decision of the Court. Four is obviously a majority of five, and is equally obviously a majority of seven; and so the decision was a decision of the Alabama Supreme Court. *See* Ala. R. App. P. 16(b): "The concurrence of five justices in the determination of any cause shall be necessary and sufficient thereto, except when, by reason of disqualification the number of justices competent to sit therein is reduced, in which event the

concurrence of a majority of the justices sitting shall suffice." Nor was there any need for the appointment of a special court under Ala. Code § 12-2-14 (1975) because only two justices were disqualified. We regret having to burden this Court with these intricacies of state law, because (having been decided at least implicitly by the Alabama Supreme Court) they are irrelevant to any issue properly before this or any other federal court in this case; the only reason we mention these points is to forestall obfuscation by the Respondents.

Finally, the Respondents, trying to downplay the unprecedented nature of the Eleventh Circuit's decision in this case, will once again try to suggest that this case is analogous to *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978). This willfully ignores the fundamental distinction between *disenfranchising* voters (which does indeed rise to the level of a constitutional deprivation in some circumstances, perhaps including *Griffin*) and *counting the ballots of qualified voters when state law so requires* (which has, so far as we are aware, never before been held to violate anyone's constitutional rights). This is the distinction which the First Circuit drew in *Partido Nuevo Progresista v. Barreto Perez*, 639 F.2d 825 (1st Cir. 1980), *cert. denied*, 451 U.S. 985 (1981), in distinguishing its own prior opinion in *Griffin* and holding that there was no constitutional claim. As the Davis class has shown above, the conflict between this case and *Barreto Perez* is one of the primary reasons for this Court's review.

5. The issues involved in this case are the most important ones in our democracy: the right to vote, and the proper role of the federal judiciary in our system of federalism. As discussed above, the considerations set forth in Supreme Court Rule 10.1 strongly support the grant of a writ of certiorari, as the decision of the Eleventh Circuit conflicts with that of the Alabama Supreme Court in this same case and with those of other federal courts in similar cases. Even if there were no conflict between the Eleventh Circuit and the Court of last resort in Alabama,

and even if there were no conflict between the Eleventh Circuit and the other Circuits, the issues in this case are of such importance that this Court should exercise its discretion to grant a writ of certiorari. The State of Alabama is justified in deciding, as a matter of state law, that it should count absentee ballots which are not notarized or witnessed but which substantially comply with the requirements of Alabama law. This Court should protect the basic principles of federalism which allow States to make such decisions. The courts below have infringed upon our system of federalism in a way that cannot be allowed to stand, even through further proceedings below. This Court should grant the writ of certiorari now, in order to avoid further disruption of our system of federalism.

CONCLUSION

For the reasons stated herein, Petitioner John Davis and the class of disenfranchised voters whom he represents respectfully request that this Court grant the writ of certiorari to review the decision of the U.S. Court of Apeals for the Eleventh Circuit.

Respectfully submitted,

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